(14)

No. 83-2161

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et. al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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The Blackfeet Tribe and the various _amici_ supporting the Tribe all urge this Court to do what Congress did not do--eliminate the tax authorization in the 1924 Act.

Most of the arguments of _amici_ present policy reasons which purportedly support the Tribe's position that there should be no state taxes paid on the Tribe's royalties.

An argument made by the Tribe and by amici Cotton Petroleum, et. al. is that none of the applicable regulations adopted pursuant to the 1938 Act authorized state taxation, and that this lack of tax regulation is evidence that the 1938 Act did not include the tax consent. The Blackfeet Tribe's most vigorous argument is that the State's description of pre-1977 administrative history in relation to state taxes on tribal royalties is factually wrong, and that there is no evidence in the record that the Tribe's royalties were taxed with any consistency in the past. Tribe's Br. 1-3, 7, 22-26.

None of the arguments of the Tribe or the supporting amici undermines the State's arguments expressed in its petition for a writ of certiorari and

in its brief on the merits of this case. This reply brief addresses those arguments which may not have been sufficiently anticipated or explored in the State's petition or opening brief.

I. ADMINISTRATIVE PRACTICE AND POLICY HAVE BEEN TO ALLOW STATE TAXATION OF THE BLACKFEET ROYALTIES.

The Tribe alleges that there is nothing in the record showing that taxes on tribal royalties have been paid consistently or that the United States knew of or condoned the taxation. The Tribe argues that therefore the fact of payment of taxes cannot be used by the Court as evidence of any administrative practice or policy. This argument is astonishing, given the complaint of the Tribe seeking an accounting from the State and a refund for whatever taxes had been paid since 1972 attributable to

the tribal royalty. First Amended Complaint of the Blackfeet Tribe of Indians, No. CV-78-61-GF, Pet. App. 131. Now, more than six years into this litigation, and only after this case reaches this Court, the Tribe has the audacity to say that the taxes have never been paid to any significant extent or with any consistency.

The State has never conceded that, in fact, the tribal royalties have been taxed. See State's Br. 15 n.5; State's Brief in Support of Motion for Summary Judgment (CR 65). In the district court, the Tribe admitted that it had not itself paid taxes to the State (Tribe's Answers to the State's Requests for Admission and Interrogatories, CR 56), but alleged that its royalties had been diminished by taxes paid by producers which the

producers attributed to the tribal royalties. Without naming the producers as defendants, the Tribe sought a refund for its portion of the taxes paid to the State by the producers.

The State argued that the producers (not the Tribe) reported all production and paid all taxes, as required by the Montana statutes. Montana Code Annotated §§15-23-601, -603, -605, -607, -608; 15-36-101, -103, -105; 15-38-103, -106, -108; §82-11-101, -131, -132 and Revised Codes of Montana, 1947, §§84-2202, -2204, -2205, -2209.1, Pet. App. 181-222. The statutes allowed, but did not require, the producers to make pro rata deductions from the royalty payments for the taxes paid by the producers on the tribal royalties.

Ibid. With the exception of the net proceeds of royalty tax which segregated the Tribe's royalty interest, none of the production reports filed by the producers reflected the extent of the Tribe's interests. None claimed exemption from taxation. See CR 65, Ex. 2-6. The State's evidence showed that therefore it was impossible to know from the State's records that tribal royalties had been taxed. CR 65.

In the district court, the Tribe argued that there was extensive evidence that its royalties had been taxed for years. The Tribe submitted evidence showing that its royalties had been diminished by the producers in the amount equivalent to the taxes attributable to the Tribe's royalties. The Tribe relied heavily upon the

Special Report to the Bureau of Indian Affairs attached as Exhibit C to the Tribe's Brief in Support of Motion for Partial Summary Judgment. CR 52. The Tribe now characterizes the same report as showing that some taxation occurred between 1955 and 1977, but argues that the taxation was so sporadic as to be meaningless in the context of administrative practice.

The taxation which the Tribe begrudgingly concedes occurred between 1955 and 1977 does constitute evidence of administrative practices for that period, at least. In addition, it is unlikely that such taxation inexplicably began in 1955, years after the passage of the 1938 Act which the Tribe contends eliminated all authority for the collection of such taxes.

The Tribe also argues that there

is nothing in the record to show that the United States condoned, facilitated, or enforced, the tax collection. Admittedly, the extent of involvement of the United States in the collection of taxes attributable to royalty is not precisely delineated in the record. The State has never argued that the United States has enforced collection of the State's taxes. However, there is evidence in the record showing the involvement of the United States Geological Survey in the crediting of taxes paid by producers against payments owed on tribal royalty. The State's Reply Brief in Support of Motion for Summary Judgment (CR 62) had attached to it a 1978 letter from the United States Geological Survey's acting area oil and gas supervisor to lessees and operators

of Indian tribal land leases located in Montana, including on the Blackfeet Reservation. That letter indicated that while it had been the past practice of the Geological Survey to credit producers' tax payments to their royalty payments, that practice would cease as a result of the 1977 Solicitor's opinion.

The involvement of the U.S.G.S. in diminishing the Tribe's royalties by the amounts of taxes which the producers claimed to have paid is evidence of the United States' facilitation of the collection of the taxes. In addition, the record is clear that the United States has never challenged the collection of taxes attributable to the royalties. After years of litigation in this case, the United States has suddenly appeared as

amicus, but has not suggested that it has ever questioned the State's taxes prior to the 1977 Solicitor's opinion.

The Tribe challenges the State's argument that the various opinions from the Department of Interior also evidence an administrative policy and procedure acknowledging the authority of the states to impose taxes on the tribal royalties. The Tribe argues that the opinions prior to 1977 should be ignored because they do not discuss the 1924 tax authorization in relation to post-1938 leases. It is true that none of the opinions from the Department of Interior, prior to 1977, suggested that the 1938 Act needed to incorporate specifically the already existing tax authorization, or the authorization would disappear, despite the provision in the later statute that

only parts of acts "inconsistent with" the 1938 Act were repealed. The law at that time (and now) was that a repeal of acts inconsistent with a given act shows the intent of Congress "to leave in force some portions of former acts relative to the same subject matter." E.g., United States v. Henderson, 78 U.S. (11 Wall.) 652, 656 (1870). See Petition 35-36; State's Br. 34-36. The fact that the 1977 Solicitor's opinion employed an analysis and made distinctions which had apparently never occurred to anyone before does not elevate that opinion to the position of the first careful and correct review of the question. (Tribe's Br. 3). A reading of the pre-1977 opinions from the Department of Interior on the applicability of Montana's taxes to royalties shows that it had never

occurred to anyone in the Department to opine that the tax consent provision in the 1924 Act had somehow disappeared upon passage of the 1938 Act, or that post-1938 leases were to be viewed differently from pre-1938 leases with respect to taxation. The various opinions from the Department of Interior prior to 1977 show that the Department was aware of the taxation and did not view it as wrong. Pet. App. 232-266.

II. THE ABSENCE OF TAXATION REGULATIONS PURSUANT TO THE 1938 ACT DOES NOT SUPPORT THE TRIBE'S POSITION.

The Tribe supplied the district court with copies of the relevant regulations on Indian oil and gas leasing since 1938. (CR 52). The regulations say nothing at all about state taxation. The Tribe submitted the regulations to support its argument

that the 1924 tax consent was repealed in 1938, arguing that the regulations' silence on authority to tax "obviate[s] any suggestion that the Secretary of the Interior, by regulation, approved taxation of tribal royalties pursuant to the repealed 1924 Act or any other statute." (CR 52, p. 9). In its brief to this Court, the Tribe now points out that new regulations were enacted in 1938 to implement the 1938 Act, and that prior regulations were expressly superseded. Tribe's Br. 21. The regulations referenced by the Tribe, 25 C.F.R. part 186, were the regulations adopted to carry the 1938 Act into effect, and they say nothing at all about consent to tax. Amici Cotton Petroleum, et. al. argue that the failure of 1938 Act regulations to incorporate the tax consent provision

shows that the Secretary of the Interior believed that the tax provision was not authorized, particularly since the 1938 Act regulations did incorporate at least one other provision from the 1924 Act. Cotton Petroleum Br. 15-16 n. 13.

What is not mentioned in these arguments about the effect of the silence on taxation in the 1938 Act regulations is that regulations which implemented the 1924 Act were likewise silent on taxation, despite the express tax consent provision in the 1924 Act. See Regulations Governing The Leasing Of Tribal Lands For Mining Purposes, approved July 23, 1924, by Hubert Work, Secretary of the Interior, Office of Indian Affairs, .12/T73(4)/726, Printed Archives Branch, National Archives, Washington, D.C. The regulations

enacted to implement the 1938 Act did expressly supersede all prior regulations. 25 C.F.R. 186.28 (1938). See also 25 C.F.R. 186.29 (1939), and 211.29 (1984). Unlike provisions that have been implemented by regulation, the tax authorization is not subject to being superseded by subsequent regulations. Contrary to the suggestions and arguments by the Tribe and amici, there is no significance at all to the lack of regulations on taxation of tribal royalties in the regulations implementing the 1938 Act.

III. NO POLICY ARGUMENTS COMPEL THIS COURT TO HOLD THAT THE 1924 ACT'S TAX CONSENT SHOULD NOT EXIST.

The Tribe and some amici consider in detail possible policy concerns which Congress could or should have had in mind when it passed the 1938 Act. E.g., Cotton Petroleum, et. al. Br. 3;

Tribe's Br. 3-4; United States' Br. 7, 20. These policy concerns require an examination of statutes other than the act in question; require conjecture about what Congress might do were it to have certain types of information before it; and demand that this Court ignore both the language of the 1938 Act and those things that the accompanying reports state the Act was to accomplish. Neither policy arguments nor convoluted inferences of what Congress might have meant or should have meant should control the interpretation of the tax consent provision in question. Congress authorized the state taxes in question here, and has done and said nothing to eliminate this authorization. The repealer in section 7 of the 1938 Act left the tax authorization intact.

Arguments about perceived problems stemming from that tax consent should not be used to propose a judicial excise of the provision. Instead, an examination of the language of the controlling statute and its accompanying congressional reports must be made.

This Court has been emphatic and consistent in saying that the relevant language of a statute, not a perceived overall purpose of Congress, must control a judicial construction of a statute. E.g., Ernst and Ernst v. Hochfelder, 425 U.S. 185, 198 (1976). Political branches, not the judiciary, determine what accords with "some modicum of common sense and the public weal," and the judiciary looks skeptically at policy arguments that are not firmly expressed in the

controlling statutory language. T.V.A. v. Hill, 437 U.S. 153, 194-195 (1978). "[This Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." Ibid.

Last month this Court reminded us again that the role of the judiciary is to read the plain language of a statute, and to use as an aid, if necessary, the legislative history of the statute involved. "The authoritative source for finding the Legislature's intent lies in the committee reports on the bill [being examined]." Garcia and Garcia v. United States, ___U.S.___, 53 U.S.L.W. 4016 (December 11, 1984). In Garcia, this Court used standard canons of

construction to interpret the language of the statute in question, and refused to look beyond the committee reports for the statute in order to divine Congress' intent.

In the instant case, the congressional reports accompanying the 1938 Act do not state that previous tax authorizations are inconsistent with the purpose of the 1938 Act. Those reports do discuss the specific practices and situations involving Indian mineral leasing that were considered inimical to the interests of the Indians and thus required congressional action. Pet. App. 343, 355; State's Br. 76-84. The Ninth Circuit and the Tribe would have a judicial examination of the 1938 Act that goes far beyond the language of the Act and its reports. The excuse

for doing this seems to be a perception that authorizations to tax Indian property were a rarity in 1934 and 1938, and that because they were not the "norm," they are suspect. E.g., Tribe's Br. 27; United States' Br. 7, 14. Yet, a brief was submitted to the Committee on Indian Affairs by the Commissioner of Indian Affairs during the I.R.A. Hearings showing that Congress' power to authorize taxation of tribal property was not weakened in 1934. Brief Submitted by Commissioner of Indian Affairs Relating to Power of Congress Over Indians, I.R.A. Hearings at 270. More often than not, when Congress authorized tribes to lease their minerals, it seemed to authorize taxation of those minerals. See, e.g., the statutes listed in State's Br. 35 n. 8.

Even if the conjectures and fears expressed by Cotton Petroleum, et. al., and conjectures made by the United States about differences between the 1924 Act's tax authorization and authorizations in other leasing statutes were true, or if they were somehow relevant to this case, it is significant that these sorts of concerns were not expressed in the 1938 Act itself or in the reports accompanying the 1938 Act or its predecessor bill. Despite the possible problems and burdens described by Cotton Petroleum, Congress did authorize taxation in 1924 and has not done anything to eliminate that authorization. Despite possible differences between the economies of the Oklahoma Tribes and tribes on treaty reservations referred to by the United States

in its brief, Congress did authorize taxation of mineral production included in the 1924 Act, just as it authorized taxation of the property of the various Oklahoma Tribes. The types of problems and concerns described by amici as reasons for not upholding the taxes are not for the judiciary "to speculate, much less act on." "[W]hether Congress would have altered its stance had the specific events of this case been anticipated" is simply not a matter for the courts to decide. T.V.A. v. Hill, supra, 437 U.S. at 185.

In support of a policy argument, amici Cotton Petroleum, et. al., and the Assinibine and Sioux Tribes of the Fort Peck Reservation, et. al. bring to this Court's attention language in 25 U.S.C. §2105 saying that Secretarially-approved joint ventures with Indian

Tribes pursuant to 25 U.S.C. §2101, et. seq., are not subject to or limited by the 1938 Act or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian Tribe. Cotton Petroleum Br. 7 n. 8; Assiniboine and Sioux Br. 7. This language is worth noting only because it shows that Congress uses express language to remove legislative provisions from the operation of existing federal statutes. Congress did not write the 1938 Act to say that leases under that act would not be subject to any other law on the subject. Instead, Congress provided only that parts of acts inconsistent with the 1938 Act were repealed.

IV. SECTION 7 OF THE 1938 ACT LEAVES THE 1924 TAX CONSENT PROVISION INTACT.

The Tribe and various amici make labyrinthine arguments and suggestions purporting to show that the tax consent in the 1924 Act is, in fact, inconsistent with the purposes of the 1938 Act, or at least inconsistent with the purposes of the Indian Reorganization Act. E.g., Tribe's Br. 10-18; Crow Br. 4; United States' Br. 24-26. The Crow Tribe even argues that a tribe should be able to try to prove that a particular tax is inconsistent with the purposes of the 1938 Act. Crow Br. 5. As previously discussed, the taxation authority is not inconsistent with the 1938 Act (State's Br. 70-84) or with the I.R.A. (State's Br. 49-66). Also, as noted in part III, infra, Congress' practice and power to authorize local

and state taxation of tribal property was not attacked or undermined in 1934. I.R.A. Hearings at 270.

The responses to the State's brief do not come to grips with the meaning of section 7 of the 1938 Act. None of the Tribe's amici appear to challenge directly the construction put on repeals of inconsistent acts as set forth in Hess v. Reynolds, 113 U.S. 73, 79 (1885); United States v. Henderson, 78 U.S. at 656, supra, and IA C. Sands, Sutherland Statutory Construction §23.08 at 221 (4th ed. 1972). See, State's Br. 34-35. The Tribe, however, argues that this Court's decision in Andrus v. Glover, 446 U.S. 608, 616-18 (1980), compels the interpretation that such a repealer completely repeals or otherwise eliminates an earlier statute on the same subject. Tribe's Br. 21.

Andrus v. Glover does not dispell the long-standing construction of the type of repealer in Section 7 of the 1938 Act. Since Glover is the only authority cited for the proposition that Section 7 of the 1938 Act should be construed contrary to the State's position and supporting authorities, analysis of that case is warranted.

Glover dealt with the question of whether "The Buy Indian Act" authorized the Bureau of Indian Affairs to enter into road construction contracts with Indian-owned companies without following the advertising and bidding provisions of Title III of the Federal Property and Services Act. "The Buy Indian Act" specifically permitted the Secretary to purchase the "products of Indian industry" "in open market," thereby avoiding the advertising and

bidding requirements otherwise imposed on government purchases. 446 U.S. at 613. This Court held that "products of Indian industry" did not include road construction projects. 446 U.S. at 116. Even if that interpretation could apply to "products of Indian industry," this Court noted that there were enumerated exceptions to Title III's advertising and bid requirements. There were no exceptions listed for Bureau of Indian Affairs road construction contracts, so this Court held that such projects did not lie outside the advertising and bid requirements. 446 U.S. at 616-617.

The Tribe apparently relies on Glover because "The Buy Indian Act," Act of June 25, 1910, 36 Stat. 861 provided:

> [t]hat hereafter the purchase of Indian supplies shall be

made in conformity with the requirements of §3709 of the Revised Codes of the United States [a statute requiring advertising for bids for government procurements]: Provided, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed. [emphasis added].

This Court did not deal directly with the meaning of the repealer of "all Acts and parts of Acts in conflict," in holding that only the purchases of products of Indian industry (and not road construction projects) could be negotiated for, rather than advertised and bid. That was because only the purchases of products of Indian industry were excepted from the advertising provision

of §3709 of the Revised Codes of the Unitex States to which "The Buy Indian Act" was otherwise subjected. Act of June 25, 1910, supra. Subjecting service contracts to the advertising provisions was not in conflict with "The Buy Indian Act," because "The Buy Indian Act" always included service contracts in the advertising requirements of §3709. Glover cannot be analogized to the statutes at issue here, and could not stand for the proposition stated by the Tribe.

Glover could be cited as authority for the Tribe's interpretation of the repealer in Section 7 of the 1938 Act only if the 1938 Act had been drafted differently. In order make the 1938 Act analogous to the statutory language considered in Glover, Congress must have said that the 1938 Act was subject

to the 1924 Act (as "The Buy Indian Act" was subject to §3709), except that there shall be no State taxation of tribal royalties, provided that all acts and parts of acts inconsistent (or in conflict) with the provisions of the Act are hereby repealed. Of course, Congress did not write the 1938 Act that way, and the statutes and this Court's statutory interpretation in Glover cannot be compared to the statutes and their interpretation here.

Glover is the only case authority cited for the proposition that a repealer which repeals inconsistent acts shows a Congressional intent to make a "comprehensive law" replacing prior laws. Tribe's Br. 21. Glover does not support that proposition. Nothing in Glover detracts from the State's argument that a repealer such

as the one in Section 7 of the 1938 Act expressly limits repeals to acts that are inconsistent.

CONCLUSION

Nothing in all of the briefs of the Tribe or amici undermines the validity of the State's arguments. The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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